upgrading as for downgrading should be entitled to a presumption of reasonableness. The upgrade rate can be presumed to be reasonably low because the cable operator has every incentive to promote subscription to all of its programming. This approach will similarly promote subscribers' ability to downgrade their service selection to the new basic service tier without discouragingly high change charges being imposed.

VII. PROVISIONS APPLICABLE TO CABLE SERVICE GENERALLY

A. Geographically Uniform Rates And Discrimination

The 1992 Cable Act mandates that a rate-regulated cable operator's "rate structure" be uniform throughout the "geographic area" served by the cable system.[164] The plain meaning of this section requires that rate structures, vis-a-vis rate levels, are uniform within the relevant area. Arranging for uniform structures, which set out various service classifications and components, charges in addition to the service charges such as franchise fees, retransmission consent fees, volume discount availabilities, etc., supports the underlying "redlining" prohibition already contained in the 1984 Cable Act.[165] It does not require uniform prices (or rate levels, in rate regulation parlance), but rather helps to discern whether the various rate level differences are permissible or, alternatively, unlawfully discriminatory.

The distinction between rate structure versus rate level is well-understood in economic regulation and, indeed, in the Communications

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[164] 1992 Cable Act § 623(d).

[165] See Communications Act of 1934 § 621(a)(3).

Act itself as in the area of telephone regulation.[166] The Notice reveals that this distinction is recognized by the Commission, as well:

> We tentatively conclude that the statutory requirement of a geographically uniform rate structure does not prohibit establishment of reasonable categories of service with separate rates and terms and conditions of service.... We do not interpret the statutory mandate for uniform rate structures as precluding reasonable discriminations in rate levels among different categories of customers provided that the rate structure containing such discriminations is uniform throughout a cable system's geographic service area.[167]

Section 623(d) should be construed as complementary to the 1984 Cable Act provision (47 U.S.C. § 541 (a)(3)) which requires franchising authorities to assure that access to cable service is not denied to any group of potential subscribers because of their income.[168] In short, Section 621(a)(3) prevents the cable operator from "redlining", i.e. not serving, unattractive neighborhoods; and Section 623(d) ensures that unlawfully high prices aren't "hidden" in disparate rate structures for those same neighborhoods. Uniform rate structures also support Section 623(e) of the 1992 Cable Act, which permits -- but does not require -- state, local, and federal authorities to issue regulations "prohibiting discrimination among subscribers and potential subscribers to cable service." Because Section 623(e) specifically identifies certain classes of subscribers, (e.g., senior citizens,

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166 See generally Bolter, Duvall, Kelsey & McConnaughey, Telecommunications Policy for the 1980's: The Transition to Competition, at 31-35 (1984); Private Line Rate Structure, 97 F.C.C. 2d 923 (1984).

167 Notice at ¶ 113.

168 This provision also should be considered complementary to the typical franchise requirement that the cable operator build the entire franchised territory, or at least all of it with a minimum specified density of homes per mile.

hearing-impaired persons), it is clear that Section 623(d) is intended to regulate only rate structures, not rate levels. Thus, for example, Section 623(d) does not speak to the question of whether a cable operator can charge a different price to an apartment owner who buys cable service "in bulk" than what it charges an individual consumer living in an apartment building.

Within the general framework of Section 623(d), however, there are three specific points that need to be emphasized:

(1) When a single cable system serves more than one franchised area, rate structures (as term is described supra) need not be uniform among those franchised areas.

(2) The geographic uniformity requirement does not bar the cable operator from individually negotiating for provision of service to a multiple dwelling unit ("MDU") such as a condominium association, an apartment owner, a hotel owner, and the like in competition with SMATV and MMDS operators who may be offering similar deals.

(3) The geographic uniformity requirement does not bar a community-wide cable operator from lowering its price to meet a competitive price from a second cable operator or other multichannel video programming distributor that has not built (or does not serve) the entire franchised territory or that does not face the same governmentally imposed costs (both direct and indirect) as the community-wide operator.

Time Warner believes that, although "geographic area" should be presumed to be the entire territory served by a single cable system, in those circumstances where a single, technically integrated system serves more than one franchised territory, the cable operator should be allowed to alter its rate structure, as well as its rate levels, across the franchised territories. Second, Time Warner believes that cable operators should be free to negotiate individual arrangements with MDUs without being obligated to offer the same arrangement to every other potential MDU in the geographic area served by the system. Stated both direct and indirect. For example, direct costs would be those costs that may be passed through and separately itemized on the customer's bill pursuant to existing law.[170] A uniform rate structure may be implemented so that the charges for cable service are separately set out from taxes, franchise fees, and other governmentally imposed direct costs collected by the cable operator from the customer. Differences in these costs between franchised territories served by a common system will be reflected in rate levels but will not place the cable operator in jeopardy under Section 623(d).[171]

Significant indirect costs on a cable operator should also be accounted for in rate structures. For example, a franchising authority

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[170] See 1992 Cable Act § 622(c)(permitting separate itemization of the franchise fee amount, PEG channel expenses, and any other fee or tax imposed by the government on the transaction).

[171] To illustrate, suppose a cable operator serves two towns -- Anytown and Everytown -- with a technically integrated cable system. The cable operator's charge for basic service is $15.00 per month. However, Anytown collects a 5% franchise fee from the cable operator, requires the cable operator to support PEG channels at an average monthly per subscriber cost of 50 cents, and charges a 2% "wire utility tax" on the gross amount of the transaction, which the cable operator is required to collect. Everytown charges the same 5% franchise fee, but does not have the wire utility tax and does not require the cable operator to support PEG channels. The basic customer in Anytown gets a monthly cable bill of $16.78 ($15.00 basic service + $0.95 franchise fee + $0.50 PEG charge + $0.33 "wire utility tax"). The basic customer in Everytown receives a monthly cable bill of $15.95 ($15.00 basic service + $0.95 franchise fee). There is no violation of Section 623(d) because the cable operator's charge for basic service is the same; the difference between the amount of the two bills is solely the result of the differences between the governmentally imposed direct costs which are in addition to the charges for cable service.

Of course, the basic service rate itself may vary from one jurisdiction to another and still be within the federal "reasonableness" standard.

even in a relatively small community can impose a very substantial cost by requiring the cable operator to build all of its plant underground. This should be a permissible separate rate component. Rate levels will vary due to other costs imposed on the operator. A franchising authority, for instance, in enforcing customer service requirements pursuant to Section 632(a)(1), might require a local office or dictate the hours that the office is open or the speed with which customer telephone calls are answered. Thus, bills in one franchise area may reflect different prices, but so long as they are within the benchmark, they are lawful. If a cable operator uses a single system to serve more than one franchised area and a particular franchise community imposes higher costs than another on the cable operator, there is no public purpose in prohibiting the operator from charging a higher price to subscribers in the community that receives those additional benefits.[172]

There are two additional reasons why rate structures, but not rate levels, should be subject to a uniformity rule. First, to the extent that the price a cable operator charges in a particular community is mandated by that community through the franchise agreement, the cable operator should not be required to adhere to that same price in other franchised territories served by the same system. While the Act does not prevent communities served by the same cable system from exercising their rate regulatory authority collectively, it is not intended to permit rate regulation in one community to have extraterritorial

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[172] The Commission appears to recognize this distinction at ¶¶ 114 and 115 of the Notice.

effects. Second, if a cable operator in one of the communities served by a technically integrated system is subject to effective competition and therefore is not subject to rate regulation, there is no reason why those rates should match exactly the rates of other communities served by the same technically integrated system. In either of these circumstances, there is no indication that the intent of Congress was that a special situation in one community (either deregulated rates or regulated rates) should dictate cable rates in other communities served by the same system.

2. Rate Structures Should Allow for Volume Discounts in Individually Negotiated Contracts With Multiple Dwelling Units Such As Apartment Buildings, Hospitals, and Condominium Associations

While the major portion of a cable operator's businesses may consist of month-to-month sales of cable television service to individual consumer households, cable operators also sell to institutional customers, such as apartment owners, hospitals, trailer parks, and condominium associations on the basis of individually negotiated contracts.[173] In some of these circumstances, the cable operator provides service to a large number of outlets for a single institutional customer (such as a hotel) in return for a fixed monthly

[173] Some franchises require cable operators to provide free cable service to certain institutions, like schools, city hall, the fire station, and even the municipal hospital. Clearly, the fact that free cable service is provided at certain locations pursuant to a franchise mandate cannot be used to imply a similar duty to provide free cable service at all similar locations served by the same cable system.

payment from that customer.[174] The number of outlets served does not vary during the life of the contract, and the duration of the contract is for a number of years.

Volume discounts are a well-established component in designing rate structures.[175] If Section 623(d) were read to exclude volume discounts, competition for this particular segment of the business would be decreased. Plainly, this would be a result contrary to the overall intent of Congress as stated in the 1992 Cable Act.

3. A Cable Operator Serving An Entire Community Should Be Permitted to Meet The Price of a Cable Competitor That Is Not Required To Serve The Entire Community Or That Does Not Face the Same Governmentally Imposed Costs

Although not traditionally a rate structure issue, a cable operator that is partially overbuilt by another cable operator or that faces geographically limited competition from another multichannel provider should be permitted to price to "meet competition." This is especially critical if the second operator does not face other governmentally imposed costs, such as local access/origination studios, institutional loops, and the like.

Typically, a new entrant begins in the most attractive portion of the franchise territory. If it does not serve the entire community or is otherwise free of certain governmentally imposed costs borne by the

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174 For example, a hotel owner may contract for basic cable and one pay service to be supplied to all of its hotel rooms. The hotel owner advertises "free cable TV," and the cost becomes part of the hotel's general overhead. The hotel guest is not billed separately for cable service. The cable operator receives the same payment regardless of the occupancy rate of the hotel.

175 See MCI Telecommunications Corp. v. AT&T, 7 F.C.C. Rcd 5096 (1993); Volume Discount Practices, 97 F.C.C.2d 923 (1985).

community-wide operator, that competitor's lower costs can allow it to underprice the community-wide operator and still make a profit. If forced to have a geographically uniform price, the operator must choose between maintaining its price and losing significant numbers of its customers in the overbuilt area, or lowering its price system-wide and, in either case, lose significant total revenues. The loss of revenues in either scenario could threaten the system's financial viability. While consumers in the non-overbuilt area might benefit in the short-run from lower prices, that benefit will be short-lived if the cable operator serving their neighborhood is forced to reduce quality or is financially strained because it has been prevented from meeting a competitor's price on a geographically selective basis.

The need to meet competition is an established principle in both regulatory and antitrust jurisprudence. The Robinson-Patman Act provides for a specific statutory defense that allows a price difference to "meet an equally low price of a competitor."[176] Thus, in enacting the Robinson-Patman Act, Congress preserved the ability to compete by writing a "meeting competition" defense into the statute. Similarly, competitive necessity is a fully recognized justification for lower prices under Title II regulation of telephone carriers.[177]

This ability to meet a competitor's price in the overbuilt area would confer a long-term benefit on consumers in two ways: first, it would improve price competition in the overbuilt area; second, it would

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[176] 15 U.S.C. § 14(b).

[177] See AT&T Co. v. FCC, 449 F.2d 439 (2d Cir. 1971); Private Line Rate Structures, 97 F.C.C.2d 923 (1984).

make it less likely that the cable subscribers in the non-overbuilt area would face reduced services.

If the community-wide operator is permitted to match the lower price of a competitor, the risk is reduced that it will be financially impaired. This benefits the entire subscriber base. Although customers <u>outside</u> the overbuilt area may not realize an obvious benefit from reduced prices <u>inside</u> the overbuilt area, customers inside the overbuilt area will realize such a benefit.

Finally, while most promotional rates are offered system-wide, it has long been industry practice to offer special promotional rates or other incentives to customers or potential customers living in a particular area such as a neighborhood that has just been wired for cable television or whose cable television wiring has just been rebuilt and upgraded by the cable operator. Usually these promotions are either free or reduced-rate initial installation charges or are discounted service charges for the first month. These promotions induce increased subscribership at increased service levels and thus help to spread the heavy fixed costs over a greater number of subscribers. They thus promote overall consumer welfare and should be viewed as benign.[178] Promotional and/or introductory discounts are

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[178] Moreover, a cable system rebuild, no matter how carefully done, often engenders temporary service outages and service deterioration, inevitably causing some erosion in the cable operator's goodwill with the affected customers. Promotions in a rebuilt area should also be seen as the cable operator's legitimate effort to recoup goodwill in a neighborhood whose cable service may have been adversely affected during the rebuild process.

also well-accepted rate structure components in traditional rate regulation.[179]

4. Section 623(e) Is Designed Solely to Authorize Rate Discrimination in Favor of Senior Citizens and Other Economically Disadvantaged Groups and to Authorize Regulation of Rates Charged for Equipment to Assist the Hearing-Impaired

Reflecting the current practice of some cable operators to grant a "senior citizen discount," the Congress has specifically protected such customer-based rate discrimination in Section 623(e). It also has specifically authorized a franchising authority to require the cable operator to supply equipment to hearing-impaired customers and to regulate the price charged for such equipment. Beyond that, Section 623(e) simply clarifies Congressional intent that the 1992 Cable Act does not prohibit franchising authorities from adopting other kinds of non-discriminatory regulation. Based on the absence of any legislative history supporting such a notion, Time Warner does not believe that this section constitutes a Congressional blessing of any comprehensive effort to regulate a cable operator's rate categories.

While franchising authorities and other governmental bodies undoubtedly have the authority to prohibit discrimination on the basis of race, religion, sex, or national origin, there is no indication in the legislative history of a Congressional intent to go beyond these suspect classes here. Nor is there any legislative finding of any such discrimination on the part of cable operators. Therefore, Time Warner believes the correct application of this provision is only to protect

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[179] See OCP Guidelines, 59 Rad. Reg. (P&F) 2d 71 (1985); United States Transmission Systems, 66 F.C.C. 2d 1092 (1977).

"senior citizen" rates and other special rates for economically disadvantaged groups and to provide for the possibility of mandated furnishing of equipment to assist hearing-impaired cable customers at regulated rates. On the other hand, franchising authorities must not be allowed to prohibit business-justified differential rates for various classes of subscribers which do not incorporate any such "suspect" types of discrimination -- for example, different charges for residential and commercial users.

B. The 1992 Cable Act's Negative Option Prohibition Is Limited To Situations Where A Subscriber Is Billed For A Completely New Programming Package or Service Not Previously Part of Services Delivered to the Subscriber and Not Affirmatively Requested By The Subscriber

Section 623(f) of the 1992 Cable Act provides that "[a] cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name."[180] This provision was added to the 1992 Cable Act largely as a result of a marketing strategy by which subscribers were provided with a new premium service not previously offered on any of the subscribers' existing tiers. Subscribers were to be billed for this new service unless and until they notified the cable system to cancel it.[181] As a premium programming service provided on a per channel basis, this service was not subject to rate regulation under the 1984 Cable Act. This "negative option" marketing strategy led to considerable adverse

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[180] 1992 Cable Act § 623(f).

[181] See 138 Cong. Rec. S.14248 (daily ed. Sept. 21, 1992)(statement of Sen. Gorton).

public reaction.[182] While there was tremendous consumer benefit in receiving a premium service for an unprecedented low price, the Congress deemed it appropriate to compel cable operators to undertake the costly subscriber-by-subscriber marketing of such service in order to obtain affirmative acceptance of the service.

The experience described above should be understood to define the limits of the 1992 Cable Act's negative option provision. Specifically, a negative option should be deemed to occur only where a subscriber is provided with and billed for a completely new programming package or service consisting entirely of services to which the subscriber did not already subscribe, and without the subscriber's affirmative request to do so (either orally or in writing). This test would fully encompass the specific situation Congress intended to reach. In all other instances, the rearrangement of services would be subject to either the 1992 Cable Act's basic rate regulation provisions (if the change occurred on the basic service level and the cable system was not subject to effective competition),[183] the cable programming service outlier complaint mechanism (if the services in question are cable programming services),[184] or even a claim under the 1992 Cable Act's anti-evasion provisions on the basis of an imputed rate increase (e.g., less service for the same rate).[185]

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182 See, e.g., "Cable Concern Bows to Suits," New York Times, June 14, 1991, at D17.

183 1992 Cable Act § 623(b).

184 Id. § 623(c).

185 Id. § 623(h).

The legislative history to the 1992 Cable Act's negative option prohibition makes clear that "[t]his provision is not intended to apply to changes in the mix of programming services that are included in various tiers of cable service."[186] Unless "negative option" is properly defined in this fashion, Congress' intent to allow "changes in the programming mix," which the Commission agrees is permitted, as well as cable operators' right to retier, would be jeopardized. For example, it is quite common and quite conceivable that a programming change would involve the addition (or substitution) of programming on an existing tier, and there is no evidence that Congress intended to foreclose this type of change. Moreover, requiring cable operators to remarket to every subscriber the reconfigured service following each programming change, including the addition or deletion of programming services, would be unduly burdensome upon cable operators, and would severely hinder the 1992 Cable Act's goal of "ensur[ing] that cable operators continue to expand, where economically justified, their capacity and the programs over their cable systems."[187]

Accordingly, the Commission should not define "negative option" as broadly as suggested by the Wisconsin Department of Justice, which has proposed to require downgrading and remarketing of customers upon launching a lifeline basic tier. Wisconsin's proposal would, among other things, require cable operators to notify each customer of "the

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[186] Conference Report at 65. See also Notice at ¶ 118.

[187] 1992 Cable Act § 2(b)(3).

elimination of a program channel or other item within" a cable service.[188] Thus, Wisconsin's proposal would essentially outlaw all retiering, a result that would flagrantly violate a fundamental cable operator right.[189] Congress has specifically permitted programming changes; prohibiting or subjecting them to extensive remarketing requirements would be unduly burdensome on both operators and consumers. There would be little value to a cable operator's right to retier, which is unquestionable under the 1992 Cable Act, if any such retiering or deletion would be viewed as a prohibited negative option unless the service was remarketed to each subscriber of the tier. This would effectively eliminate the right to add or delete services because of the potential marketing cost and delay in implementing service.

Time Warner agrees, therefore, with the Notice's tentative conclusion that "a change in the composition of a tier that was accompanied by a price increase justified under our rate regulations would not be subject to the negative option billing prohibition."[190] We also agree with the Notice that the negative option provision does not "apply to system-wide upgrades in equipment accompanied by a justified price increase."[191] However, this definition cannot logically be limited to "justified" price increases. In so limiting

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188 Special Order -- Billing for Unordered Cable Services (proposed), Wisconsin Department of Justice.

189 See In re Community Cable, 95 F.C.C.2d 1204 (1983), recon. den., 98 F.C.C.2d 1180 (1984). Moreover, as the Notice recognizes, Congress has not only upheld this right, it has even required retiering in certain cases. See also Notice at ¶ 127.

190 Notice at ¶ 120.

191 Id.

it, the Notice confuses the narrow application of the negative option sanction with the rate regulation requirements of the Act. Whether price increases are "justified" or "unjustified" is a rate reasonableness issue. Such increases have no logical nexus with negative options. The statute and legislative history make clear that it is the introduction and unauthorized extra billing of a new service, not the particular price charged, that triggers the negative option prohibition.

Accordingly, the Commission should clarify that the following practices are not negative options:

(1) Adding services to a subscriber's existing basic or non-basic service and simultaneously raising the price. This is a rate increase that may be subject to Commission standards, but not a negative option.[192]

(2) Deleting services from an existing basic or non-basic service whether or not accompanied by any rate reduction. This might be an implicit rate increase, but not a negative option.

(3) Dividing a subscriber's existing single service tier into multiple offerings and raising the total price. Again, this is a rate increase which may be subject to Commission standards but not a negative option. The subscribers have been given the positive option not previously available to select only a portion of the prior offering.

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[192] See, e.g., 1992 Cable Act § 623(b)(7)(B)("[a] cable operator may add additional video programming signals or services to the basic service tier.").

(4) Dividing a subscriber's existing single service tier into multiple offerings at the same net price. This is not even a rate increase.

Additionally, the offering on an a la carte basis of a cable network that was previously part of a regulated tier is not a negative option if the overall rate is revenue neutral. For example, if cable service "X" is offered as part of a tier for $10, and the cable operator decides instead to offer "X" a la carte for $1 and the remainder of the tier for $9, no negative option has occurred, because subscribers have previously requested "X" and are not being subjected to a rate increase in connection with the separation of "X" from the tier.[193] Similarly, if the remainder of the tier continues to be priced at $10 and $1 is charged for "X", this is also not a negative option, although two separate rate increases have taken place, triggering a potential bad actor complaint for the tier which now contains less channels with no reduction in price.[194] "X", which is now offered a la carte, would not be subject to rate regulation, but subscribers would be free to drop it at any time. Thus, adding to, changing, or splitting the preexisting programming mix is not a negative option, and the cable operator is therefore under no

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[193] Of course, the cable operator in this example could be subject to a franchising authority requirement to provide 30 days' advance written notice of such a programming change. Id. § 624(h)(1).

[194] With such an implicit rate change on the basic service level, the cable operator is subject to the further requirement to provide 30 days' advance notice to the franchising authority of the rate increase. Id. § 623(b)(6).

obligation to remarket each offering to its subscribers.[195] A negative option only occurs when a subscriber is delivered, and billed for, an entirely new service or package of services which were not previously part of the services delivered to that subscriber, and which the subscriber has not affirmatively requested by name.

C. The Commission's Collection of Information Should Not Include Cost Data and Such Collection Should be Undertaken on a Per System Basis

The Commission seeks comment on the scope, availability, and burden of providing the Commission with financial information necessary for the effective administration and enforcement of rate regulation.[196] Time Warner contends that cost data should not be included in the information collected because it will not be necessary for the administration and enforcement of the preferred type of rate regulation, which is not based on cost of service. As discussed supra, in section III. B. 3, Time Warner advocates a benchmark approach for the regulation of basic cable service rates, thereby alleviating the need for collection of burdensome cost of service information. Moreover, the fact that Congress is requiring periodic reports from the Commission on average cable prices supports Time Warner's position that the collection of cost data is unnecessary and was not intended by Congress when it enacted Section 623(g).[197]

Rules implemented by the Commission in accordance with Section 623(g) should by no means require the collection of information beyond

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195 Id.

196 See Notice at ¶¶ 122-24.

197 See 1992 Cable Act § 623(k).

that requested on the forms sent to selected systems on December 23, 1992.[198] The information sought on those forms wisely pertains to revenue only, thereby avoiding competitively sensitive cost data which would trigger confidentiality concerns for the cable operator and the Commission. Furthermore, the plain language of Section 623(g) and the legislative history of that provision state that the Commission's rules should require only the collection of information that is absolutely necessary to administer and enforce rate regulation, and not extra, burdensome data, such as cost of service information.[199]

In addition, the Commission's rules on collection of information should impose as light a burden as possible on cable operators who are responsible for gathering the information required by the Commission. Accordingly, all data required of cable operators should be collected and submitted to the Commission on a per system, rather than a per franchise, basis.[200] Cable operators do not ordinarily keep detailed information on a franchise-by-franchise basis. If the Commission required information on this basis, it would impose a heavy burden on the cable operator to develop such data solely for the purpose of complying with the Commission's information requests. To impose such a burden when it is unnecessary would be inconsistent with Congress' goal

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[198] See Order, MM Docket No. 92-266 (released December 23, 1992).

[199] See 1992 Cable Act § 623(g)(cable operators must file with the Commission "such financial information as may be needed for purposes of administering and enforcing this [rate regulation] section"); House Report at 88 (cable operators must file "information necessary to administer and enforce" the rate regulation section).

[200] See Notice at ¶ 138.

that "the Commission [ ] shall seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission."[201] Time Warner further asserts that all Commission requests for cable system data should be contained in a single form so that the cable operator will know the full extent of information required for each system.[202]

The Commission's rules regarding collection of information should also be sufficiently tailored so that they do not apply to public companies that are already required to file such information for public disclosure. Finally, the Commission should not finalize its collection of information forms in this proceeding. Rather, the Commission should issue a further notice after the conclusion of its rate proceedings so that the forms can be specifically tailored to the rate regulations actually implemented in this proceeding.[203]

D. The Commission's Interpretation of "Evasion" Should Be Limited to Conduct, Such as Retiering, That Results in a Decreased Level of Service and an Implicit Price Increase That Exceeds the Benchmark for Reasonableness

Section 623(h) of the 1992 Cable Act requires the Commission to "establish standards, guidelines, and procedures to prevent evasions, including evasions that result from retiering, of the requirements of this [rate regulation] section."[204] The term "evasion" is rife with negative connotations -- it implies that the cable operator is

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201 1992 Cable Act § 623(b)(2)(A).

202 <u>See</u> Notice at ¶ 138.

203 <u>See</u> <u>id.</u> at ¶ 123.

204 1992 Cable Act § 623(h).

violating the letter and the spirit of the 1992 Cable Act. Accordingly, the Commission must take care in defining what constitutes an evasion.

First, it is clear that retiering per se is not an evasion under the 1992 Cable Act. Rather, the statute is intended to prohibit "evasions that result from retiering."[205] If retiering itself were automatically an evasion, the "result from" language in Section 623(h) would be superfluous. The cable operator's right to retier remains unfettered even if inconsistent with local franchise requirements, since this long-established right[206] has been reaffirmed by the 1992 Cable Act. Indeed, in light of the new statutory definition of minimum basic service,[207] which the Notice recognizes may require retiering,[208] the cable operator's right to retier has been bolstered by the 1992 Cable Act.[209]

The Conference Report recognized "that many cable operators have shifted cable programming out of the basic tier into other packages and that this practice can cause subscribers' rates for cable service to

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[205] Id.

[206] See In re Community Cable TV, Inc., 95 F.C.C.2d 1204 (1983), recon. den., 98 F.C.C.2d 1180 (1984).

[207] 1992 Cable Act § 623(b)(7).

[208] Notice at ¶ 127.

[209] See also Conference Report at 65 (specifically allowing "changes in the mix of programming services that are included in various tiers of cable service.").

increase."[210] The Commission also recognizes this distinction in the Notice:

> [W]e propose to prohibit an unjustified increase in rates to subscribers for cable service resulting from retiering that 'shift[s] cable programs out of the basic tier into other packages.' At the same time, the Cable Act of 1992 permits, and indeed appears to require in some cases, a restructuring of service offerings.[211]

Accordingly, a reading of the statute, its legislative history, and the Notice confirms that "evasion" is not intended to proscribe conduct which would be consistent with the 1992 Cable Act's rate regulation provisions. Any retiering that is revenue neutral is thus automatically permitted. Further, evasions should be limited to conduct which results in: (a) an implicit rate increase associated with tiering services, splitting tiers, or other actions which decrease service (i.e., fewer channels) to the subscriber, and (b) a price that is outside the benchmark for reasonableness. Therefore, the Commission correctly has determined that "[r]etiering necessary to comply with basic tier requirements, retiering that did not change the ultimate price for the same mix of channels in issue to the subscriber, or retiering accompanied by a price change that complied with our rate regulations would not be deemed an evasion."[212] Time Warner agrees with this proposal except possibly for the statement requiring that retiering not change the ultimate price for the same mix of channels. If "mix" of channels means the same number of channels, Time Warner has

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210 Id. (emphasis added).

211 Notice at ¶ 127 (emphasis added)(footnotes omitted).

212 Id.

no objection to such an approach. Thus, Time Warner assumes that dropping a broadcast signal from basic service because retransmission consent could not be obtained, and substituting another broadcast or cable service in its place, constitutes the same mix of channels. Any other interpretation would necessarily involve the Commission in making value judgments regarding the content of channels, an area that the Commission is neither permitted nor equipped to enter.[213]

For example, if a cable operator removes two channels from a tier and retains the same price, an evasion may have occurred if the price now exceeds the benchmark. The result of such an evasion would be that an implicit rate increase has been imposed as to that tier, and such rate increase would be subject to scrutiny pursuant to the applicable rate review procedures ultimately adopted by the Commission. However, if the cable operator removes two channels from a tier and replaces them with two different channels, while not changing the ultimate price, the Commission is in no position to rule that an evasion has occurred because the new channels are somehow less "valuable" than the channels that were removed. As Congress has determined, "changes in

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[213] Such expansive Commission intrusion into cable operators' First Amendment editorial rights surely would be found unconstitutional by the courts. See, e.g., City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1985); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. den., National Association of Broadcasters v. Quincy Cable TV, Inc., 476 U.S. 1169 (1986); Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), cert. den., National Association of Broadcasters v. Century Communications Corp., 108 S. Ct. 2014 (1988).

the mix of programming services that are included in various tiers of cable service" should be left to the cable operator's discretion.[214]

Additionally, we note that "mix or quality" of service is not subject to local review in the franchise renewal process.[215] This type of content review is thus off limits to local government as well as the Commission, and there is no evidence that Congress intended the cable operator's discretion over the mix or quality of service to be negated in the context of "evasions." The cable operator's right to retier and to determine the mix or quality of service with no governmental intrusion cannot be swept away by the broad brush of "evasion."

On the other hand, it would be easily quantifiable, identifiable, and apparent to the Commission if a cable operator decreased the level of cable service on a tier while keeping the price the same. Likewise, it would be readily identifiable if the cable operator decreased the level of service on a tier and decreased the price, but by a smaller amount in proportion to the decrease in service. For example, if two channels were dropped from a ten channel tier, but such retiering were accompanied by only a 10% price decrease, this would also be an implicit price increase. Both situations result in a higher price per channel, which can easily be ascertained. If and only if the higher price now exceeds the benchmark, an evasion would be deemed to occur. Such a definition of "evasion" would thus be consistent with the 1992 Cable Act's policy goal directing the Commission to "seek to reduce the

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214 Conference Report at 65.

215 See 1992 Cable Act § 626(c)(1)(B).

administrative burdens on subscribers, cable operators, franchising authorities, and the Commission."[216]

In sum, the concept of evasions is in no way meant to foreclose a cable operator's right to tier or rearrange services. Rather, as the Commission apparently recognizes, the prohibition against evasions is meant to target the appropriate rate for the reconfigured service tier that now contains a smaller level of services. However, any judgments by the Commission regarding a cable operator's programming mix in this situation, where the level of service remains the same, improperly involves the Commission (or local authorities) in content judgment, thereby violating not only the concepts contained in both the 1984 Cable Act and the 1992 Cable Act, but also the fundamental precepts embodied in the First Amendment.

E. All Existing Rate Regulation Agreements -- Whether Entered into Before or After July 1, 1990 -- Should be Grandfathered

The Commission seeks comment on the adoption of rules regarding the treatment of agreements between a franchising authority and a cable operator that provide for the regulation of basic cable service rates where there was no effective competition under governing Commission rules.[217] Although the 1992 Cable Act provides that such agreements are to be grandfathered if they were entered into prior to July 1, 1990,[218] there is no rational basis for differential treatment of agreements concluded after that date. The 1992 Cable Act does not

216 Id. § 623(b)(2)(A).

217 Notice at ¶¶ 134-35.

218 1992 Cable Act § 623(j).

specifically address how franchising authorities operating under identical agreements entered into after July 1, 1990 are to make the transition to rate regulation under the Commission's new rules. The Commission, therefore, seeks comment on the treatment of these agreements as well.[219] Time Warner asserts that <u>any</u> rate regulation agreement of this type still in effect upon implementation of these rules, whether concluded before or after July 1, 1990, should be treated in the same manner -- all should be grandfathered. There is simply no reason to treat valid pre-July 1, 1990 and valid post-July 1, 1990 rate regulation agreements differently.[220]

In addition, any rules implementing Section 623(j) should apply only to basic cable service as defined by Section 623(b)(7). Under this definition, cable operators are free to retier their cable programming. Any rates for non-basic tiers of "cable programming service" are then subject to exclusive Commission review pursuant to new Section 623(c).

Finally, any grandfathered basic rate agreements between a franchising authority and a cable operator must be enforceable by either party, regardless of whether the rate provided under such an agreement is greater or less than rates that might result under the Commission's new rate formula. The purpose of grandfathering existing basic rate agreements is to exempt such agreements from the rate

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[219] Notice at ¶ 135.

[220] The legislative history is silent as to the treatment of post-July 1, 1990 rate regulation agreements. <u>See</u> House Report at 89 (section-by-section analysis of 1992 Cable Act addresses only pre-July 1, 1990 rate regulation agreements).